BOARD OF APPEALS CASE NO. 074	*	BEFORE THE
APPLICANTS: Robert & Hazel Wagner	*	ZONING HEARING EXAMINER
REQUEST: Rezone 85 acres from AG to R1 and RR; 1900 E. Churchville Road, Bel Air	*	OF HARFORD COUNTY
	*	Hearing Advertised
	*	Aegis: 12/24/97 & 12/31/97
HEARING DATE: February 24, 1998		Record: 12/26/97 & 1/2/98
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ZONING HEARING EXAMINER'S DECISION

The Applicants, Robert S. Wagner and Hazel B. Wagner, request that their property be rezoned from its present AG zoning to R1 (73 acres) and RR (12 acres).

The subject property is located at 1900 E. Churchville Road, Bel Air, Maryland and is further described on Tax Map 41, Grid 3F, Parcel 124. The parcel consists of 169.36 acres and is presently zoned AG (Agricultural). The Applicants are seeking rezoning of 85 acres of the parcel, 73 to be rezoned R1 (Urban Residential) and 12 acres to RR (Rural Residential).

Mr. Robert S. Wagner appeared and testified that he was the owner of the subject property and the Applicant in this case. The witness indicated that the property had been in the Wagner family since 1956 and it had been actively farmed over the years. The Applicant indicated that crops and cattle are presently raised on the farm but that it was becoming increasingly difficult to maintain the farm in the face of economic burdens and the increasing pressure from adjoining residential properties. The witness indicated that neighbors regularly trespass on the property damaging crops and land. He often finds debris which has been dumped on the property by unknown persons. Mr. Wagner, using a set of photos identified as Exhibit 13, described the surrounding area which consists of commercial and residential development. Mr. Wagner described a number of unpleasant experiences he has had in moving large farm equipment along public roads in the immediate vicinity of his farm.

Case No. 074 - Robert and Hazel Wagner

The witness indicated that he did not apply for rezoning during the 1989 Comprehensive Rezoning because a large portion of his property was under contract with the Harford County Board of Education for construction of the planned Fountain Green Elementary School. There were also discussions with the County regarding another piece of the Wagner property for construction of a water tower. Both of these facilities were ultimately built elsewhere. Mr. Wagner explained that the current AG zoning is inconsistent with the property's current classification in the Harford County Master Land Use Plan. He stated further that he contended a mistake was made in 1989 when the Council failed to rezone this parcel. Mr. Wagner also opined that rezoning to R1 and RR was consistent with the surrounding developments and was an appropriate zoning classification for his property.

Next to testify was William P. Maloney who was accepted as an expert builder and developer. Mr. Maloney testified that there is a growing demand in Harford County for large homes on relatively large lots. He intends to construct 113 single family detached dwellings on the proposed R1 parcel and 6 homes on the RR portion of the parcel. He admitted that the ultimate configuration of lots could change somewhat as development proceeds but, given the housing market, he believes only large homes on large lots are appropriate for the site. The witness testified that the build-out would take approximately 8 years. The witness described some of the landscaping that would be required by Harford County.

Mr. Paul Muddiman appeared and was accepted as an expert in site plan design. Mr. Muddiman first explained that townhomes would not be feasible for the subject property because the Code requires that 30% of the property consist of NRD areas before townhomes may be built. This property has less than the required 30% NRD.

Mr. Muddiman then went on to explain the various changes that occurred to the water and sewer system since the 1989 Comprehensive Rezoning. In 1989 no water or sewer service existed or was planned for the subject property or the surrounding area. Since 1989, two elevated water tanks have been built and water and sewer lines have been installed which service the communities adjacent to the subject parcel.

In Mr. Muddiman's opinion, the Council could not have known about these changes since the study to determine what changes were necessary in the County water/sewer system did not get underway until December 1, 1990 when the County hired Rommel, Klepper & Kahl (RKK) as consultants to study the County water/sewer system and make recommendations for expansion and improvement. On April 20, 1990, the Master Water and Sewer Plan was updated to include the then proposed Fountain Glen water tank and proposed Glen Ridge/Cedar Road water tank, both of which have since been constructed. RKK completed its study on June 15, 1990. Based on his review of the public records, Mr. Muddiman concluded that there was no evidence to indicate that any of the improvements to the water and sewer system in the immediate area of the subject parcel were known during the 1989 Comprehensive Rezoning. The witness pointed out that, since 1989, the Amyclae subdivision has been expanded to where it now adjoins the subject parcel, creating two additional access roads which would connect the Amyclae subdivision to the proposed development on the subject site, facilitating traffic flow. The witness pointed out that this expansion was approved after the 1989 Comprehensive Rezoning.

Mr. Mickey Cornelius appeared as an expert traffic consultant. The witness indicated that he had conducted a study of traffic flow in the area and prepared a report detailing traffic impacts associated with the proposed development. The study concludes that after development, the key intersection of MD Routes 22 and 543 would continue to operate at acceptable levels of service.

Roger Mainster appeared as an expert real estate appraiser. Mr. Mainster indicated that he conducted a study of property values in the adjoining subdivisions of Amyclae, Brierhill, Tudor Manor, Hillview and Green Valley. His study concluded that property values in the communities surrounding the subject property had been steadily rising. The witness opined that development of the proposed subdivision would not adversely impact property values.

Case No. 074 - Robert and Hazel Wagner

Mr. Denis Canavan appeared next and was admitted as an expert in land use and planning. Mr. Canavan indicated that he had conducted a study to analyze the Applicant's rezoning request. In conducting his analysis he reviewed the application, the Staff Report of the Department of Planning and Zoning and attachments thereto, the tax maps, the 1982 Zoning Code, the 1988 Land Use Plan, the 1996 Land Use Plan, the current zoning maps and all of the Applicant's exhibits. He personally visited the subject site.

Mr. Canavan indicated that the property is currently designated as low intensity development and is included within the development envelope under the 1996 Land Use Plan. AG zoning for this property is presently inconsistent with the current Land Use Plan although it was consistent with the 1988 Land Use Plan. Mr. Canavan testified that, in his opinion, a mistake in the legal sense was made during the 1989 Comprehensive rezoning when the County failed to rezone the subject property. As the basis for his opinion, Mr. Canavan indicated that the Master Water and Sewer Plan has been extended to include the subject property. Water tanks have been added since 1989 as well as water and sewer lines that did not exist, even as a concept, in 1989. Without the improvements recommended by RKK in 1990, water and sewer service could not be provided to the subject property. The classification of the property under the Land Use Plan has changed since 1989, now designating the property as low intensity and within the development envelope. There are new access points existing as a result of expansion of the Amyclae subdivision. Mr. Canavan stated that there was an identified need for development of single family detached dwelling on this parcel to serve as a transition development between the development envelope and the rural area of the County.

Mr. Canavan stated that it was clearly a mistake to maintain the AG zoning for this parcel during the 1989 Comprehensive Rezoning. Based on the chronology of events, the Council could not have known that the trends and improvements described by the Applicant's witness were about to occur in the years following the 1989 Comprehensive Rezoning. He also stated that R1 and RR were appropriate reclassifications based on the location of the parcel and its proximity to other, similarly developed subdivisions. Mr. Canavan stated further that granting the rezoning was an appropriate way to remedy the mistake made in 1989.

Case No. 074 - Robert and Hazel Wagner

Mr. Anthony McClune, Chief of Current Planning for the Harford County Department of Planning and Zoning appeared next. Mr. McClune summarized the recommendations of the Department as set forth in its Staff Report submitted in this case. The Department agrees with the Applicant, that a mistake occurred in 1989 in not rezoning the subject parcel. Further, the Department agrees that the request rezoning affords appropriate relief to the Applicants.

Several protestants appeared in opposition to the request. Mr. Stephen E. Smith testified that he is concerned about increasing traffic problems associated with further development. He testified that it is not unusual to wait 15 minutes or more at the intersection of MD Route 22 and Prospect Mill Road to turn on to MD Route 22. The witness described Prospect Mill Road as dangerous and stated that there have been numerous accidents on that road.

Next to testify was Mr. Joe Fleischman who lives next to the Wagner property. He is concerned about the impact the proposed development would have on his quality of life. He stated that he purchased an existing home instead of building because of the existing natural surroundings which he believes will be lost if the proposed development occurs. He also expressed concern regarding the continued overcrowding of local schools.

Clarence Burns testified that Prospect Mill Road has become so traffic burdened that he often finds it difficult to get out of his own driveway. He described conditions on Prospect Mill Road as intolerable.

CONCLUSION:

I. Motion to Dismiss

Preliminary to the Hearing, certain opponents filed a Motion to Dismiss which was joined by People's Counsel. Some history is in order:

In January, 1996, the Harford County Council voted to commence Comprehensive Rezoning Review pursuant to Code Section 267-13 et seq. and Article VII, Section 701 of the Harford County Charter. Thereafter, the Department of Planning and Zoning accepted applications for comprehensive rezoning from July, 1996 through October 15, 1996. During November and December, 1996 the Department as required by Code Section 267-13(B)(1), reviewed each application and solicited comments upon each application from other County Departments and planning councils. In February, 1997, the Department of Planning and Zoning prepared its proposed revisions and recommendations to the Council.

Case No. 074 - Robert and Hazel Wagner

These recommendations were the subject of public meetings and further review during the spring of 1997. In May, 1997, the Department submitted its final recommendations to the Planning Advisory Board (PAB). After review by PAB, the County Executive submitted the proposed revisions and amendments to the Zoning Maps to the County Council who then entered into "the period of Council Review" as required by Code Section 267-13(D). In August, 1997 Council Bill 97-55 was introduced which proposed changes to the County Zoning Maps. On October 1, 1997 the Council passed Bill 97-55, thereby adopting the recommended changes and amendments to the zoning maps.

In November, 1997, 5,400 Harford County citizens took legislative action to Petition Bill 97-55 to referendum, thereby delaying adoption (or defeat) of the Bill and the changes to the zoning maps that it contemplates until November, 1998.

The gist of the opponent's argument is twofold. First, the opponents argue that the present Petition is barred by Section 267-13 (E) of the Harford County Code which states:

"Suspension of zoning reclassification.

(1) Notwithstanding any provisions of this Code, during the period of preparation and review of proposed comprehensive revisions or amendments to the Zoning Maps, no applications for zoning reclassification shall be accepted by the county, except as provided in subsection C of this Section, and such a request shall be considered in the preparation or modification of the proposed comprehensive revisions or amendments to the Zoning Maps.

Secondly, the opponents argue that section 267-13(E)(3) of the Code prohibits the acceptance of applications for a period of one year after the adoption of the comprehensive rezoning bill, in this case, Bill 97-55, if the basis for the request for rezoning is a "change in the character of the neighborhood". Specifically, Section 267-13(E)(3) provides:

(3) No zoning reclassification of property shall, for a period of one (1) year after the adoption, by Bill, of the comprehensive zoning maps applicable thereof, be granted by the County Council, sitting as the Board of Appeals, on the ground that the character of the neighborhood has changed.

Case No. 074 - Robert and Hazel Wagner

The first question posed is whether the "period of review" contemplated by Section 267-13(E) has ended by Council vote on Bill 97-55 or whether the period of review is extended until the referendum vote takes place in November, 1998. If the period of review is extended, then the moratorium on acceptance of piecemeal rezoning applications would likewise be extended until that vote takes place. The opponents argue that allowing rezoning cases to be heard on a piecemeal basis would defeat the purpose of the referendum and, quoting the opponent's brief, "....If zoning reclassification applications are accepted prior to November 3, the vote on the referendum will effectively be rendered moot and the right of the voters to review by petitioning Bill 97-55 to referendum will be infringed."

The Hearing Examiner disagrees with the position taken by the opponents. The Hearing Examiner is guided by the principals of statutory construction set forth by the Maryland Court of Special Appeals in Harford County, Md. V. McDonough, 74 Md. App. 119, 523 A2d 724 (1988), wherein the Court stated:

> " The cardinal rule of statutory interpretation is to ascertain and give effect to the intention of the legislative body which enacted the statute. The primary source to which we refer to determine legislative intention is the language of the statute itself. As this Court observed in Ford Motor Land Development v. Comptroller, 68 Md. App. 342, 346-47, 511 A.2d 578, cert. denied, 307 Md. 596, 516 A.2d 567 (1986):
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> > "Where the language [of the statute] is clear and free from doubt the Court has no power to evade it by forced and unreasonable construction. Thus, where there is no ambiguity or obscurity in the language of the statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly. Furthermore, the statute must be construed considering the context in which the words are used and viewing all pertinent parts, provisions and sections so as to assure a construction consistent with the entire statute. And, if there is no clear indication to the contrary, a statute must be read so that no part of it is rendered surplusage, superfluous, meaningless or nugatory. On the other hand, we shun construction of the statute which will lead to absurd consequences, or a proposed statutory interpretation if its consequences are inconsistent with common sense.
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> > Finally, we may not rewrite the statute by inserting or omitting words therein to make legislation express an intention not evidenced in its original form, or to create an ambiguity in the statute where none exists."

Case No. 074 - Robert and Hazel Wagner

In the context of the comprehensive rezoning process, the "period of review" ended when the Council voted to pass Bill 97-55. No further review is necessary on the part of the Council, the Department of Planning and Zoning, the citizens advisory boards or any other County Department that has thoroughly reviewed the various applications and made their recommendations. Whether ultimate adoption of Bill 97-55 is accomplished by referendum vote or whether the Bill is defeated is irrelevant in determining the "period of review" contemplated by the statute. This position is consistent with the moratorium provisions imposed by Section 267-13 which are designed to alleviate the burdens on the Department of Planning and Zoning and the County Council in reviewing piecemeal rezoning requests during the period of comprehensive review. It is equally clear, however, that there is one process or the other available to County property owners at all times. Either a property is the subject of comprehensive rezoning or is subject to piecemeal rezoning requests and nothing in the Code indicates a legislative intent to deny the right of any property owner to petition his or her property for rezoning for indefinite and undetermined periods of time.

Bill 95-85 was passed by the Council in January, 1996 and provided that, for a period of eighteen months from the date comprehensive rezoning commenced, no applications for rezoning would be accepted. Legislation to revise the Master Land Use Plan was introduced on May 7, 1996 and eighteen months from that date expired in November, 1997. If there were any further doubt as to the intent of the legislative body in this regard, it is laid to rest by examining subsequent acts of the Council directly related to the petition for referendum. On December 16, 1997, Councilwoman Heselton introduced Bill 97-79 which purported to be an Emergency Act which would extend the moratorium on acceptance of rezoning applications originally instituted for an eighteen month period by Bill 95-85 until after the referendum vote in November. The Bill recites as reasons for its necessity nearly all of the arguments raised by the opponents in this Motion. Significantly, this Bill was defeated by vote of the County Council which vote clearly expresses a legislative intent not to extend the period in which applications for rezoning will not be accepted.

The second argument has little merit in this case. First, the prohibition anticipated by Section 267-13(E)(3) applies only to requests for rezonings based on "change in the character of the neighborhood". The Applicants in the instant case have based their request for rezoning on a theory of "mistake" and not "change", therefore the statute does not apply.

Based on the above, the Hearing Examiner concludes that the basis relied upon by the Protestants in their Motion to Dismiss is without merit and denies the Motion.

II. The Rezoning Request

Having determined that the Application is properly before the Examiner, it must now be determined if the Applicant has met its burden of proof such that it is entitled to have the subject property rezoned.

In Maryland, a parcel of land may not be rezoned simply because the property owner wants the property rezoned or even if the zoning authority feels the property should be rezoned. Before a property can be rezoned there must be strong evidence of mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive rezoning. These principles and their corollaries were summarized by the Maryland Court of Appeals in Boyce v. Sembly, 25 Md. 43, 344 A.2d 137 (1975). The Court set forth the change-mistake rule which may be summarized as follows:

1. The zoning classification assigned to a parcel of land is presumed to be correct.

2. A piecemeal zoning classification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.

3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning or there has been a change in the character of the neighborhood of the subject property since the last comprehensive zoning which justifies the piecemeal zoning classification.

4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.

5. However, once an applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power . Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970). The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning; the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A.2d 640 (1963).

As stated by the Maryland Court of Special Appeals, the presumption of the validity of comprehensive rezoning,

> "...is overcome and error or mistake is established when there is probative evidence to show that the assumptions of premises relied upon by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Error or mistake may also be established by showing that events occurring subsequent to rezoning have proven that the Council's initial premises were incorrect...It is necessary not only to show facts that exist at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive rezoning is not overcome, and the question of error is not "fairly debatable". Joyce v. Smelly, supra; Rockville v. Stone, 27 Md. 655, 319 A.2d 536 (1974) (emphasis added).

Thus the Maryland Courts have laid out a two-pronged test. First, has a change in the character of the neighborhood or a mistake been established that would permit the rezoning of the property. Second is whether the property should be rezoned.

Case No. 074 - Robert and Hazel Wagner

During the 1989 Comprehensive Rezoning, the County Council could not have taken into account pertinent facts regarding expansion of the water and sewer service to the subject property which occurred subsequent to Comprehensive Rezoning in the early 1990's. The Applicant established convincingly that the study to review the system and recommend revisions and expansion did not even commence until after the 1989 Comprehensive Rezoning process was completed. Further, the Applicant established that a trend requiring additional low density housing has occurred since 1989 which need was met by the Council by reclassifying the property as low intensity and attempting to rezone it R1 in 1997. None of these trends or facts were known to the Council in 1989, thus it mistakenly maintained AG zoning for the property 1989.

The Applicant has established that the subject parcel is surrounded by residential development making it difficult to actively farm. The property can be adequately serviced for water and sewer due to improvements that have occurred in the water/sewer infrastructure since 1989. The proposal is consistent with the Master Land Use Plan and good planning principles. Public water and sewer is intended to serve residential development, not agricultural uses. The Applicant presented unrebutted evidence that there will be no adverse impact on traffic patterns or volumes simply as a result of this development, nor would the development negatively affect property values in the immediate neighborhood. Importantly, the Wagner property was the subject of intense review by the Department of Planning and Zoning, various county departments, the citizen advisory councils and the Harford County Council which, after this intense review, voted to rezone the property to an R1 designation.

In the opinion of the Hearing Examiner, therefore, the Applicant has met its burden of proof by establishing that a legal mistake was made by the Council during the 1989 Comprehensive Zoning Review and further, that the property is appropriately zoned as R1 and RR. The Hearing Examiner recommends that the requested rezoning be approved.

Date April 17, 1998

William F. Casey
Zoning Hearing Examiner